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Nuremberg, October 30, 1947
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PENAL

To
War Crimes Court
H a m b u r g
Curio House

WAR CRIMES
HAMBURG
463/18
DATE
6/12/47

Subject: Trial of Kapitaenleutnant Heinz E c k

Petition for pardon
on behalf of
Wolfgang S c h w e n d e r

During the trial before the International Military Court in Nuremberg against Hermann Goering et al. Grossadmiral Doenitz again and again expressed his regret in conversations with me, his counsel, about some of the officers and sailors subordinated to him being prosecuted as war criminals as a consequence of the German submarine warfare. It was his greatest wish to alleviate as much and as soon as possible the sad fate of these men drawn into the stream of events. It is in compliance with this wish of the last Supreme Commander of the German Navy that I submit to the court this petition for pardon on behalf of the youngest in age and in rank among those members of the Kriegsmarine who were sentenced as war criminals: Wolfgang Schwender.

The proceedings against Kapitaenleutnant Eck in which also the sentence on Schwender was passed, were but a prelude to the major trial before the International Military Tribunal. It was the intention of the prosecution to prove in this prelude that Kapitaenleutnant Eck had issued the order to fire on shipwrecked sailors in obediance to a direct instruction by Admiral Doenitz to do so.

The prosecution entirely failed in proving this. In the contrary, the trial held in Hamburg produced full evidence showing that Kapitaenleutnant Eck did not have at all the intention of killing shipwrecked sailors but wanted to destroy the rafts and wreckage as they were likely to be landmarks to the Allied

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airplanes controlling that part of the ocean. In spite of this fact having been established, there still remained a suspicion that the German submarine commanders did actually receive orders to kill shipwrecked sailors and that this order had had some bearing on the attitude of Kapitaenleutnant Eck. The whole trial at Hamburg was held under the shadow of this suspicion, and I believe from my own experience as a judge in the German Navy, that such an atmosphere can hardly remain without influence on the final outcome of the trial.

Now after 1 year of uninterrupted hearings and thorough investigations the sentence passed by the International Military Tribunal on September 30, and October 1, 1946 has proved beyond doubt that this suspicion was not justified.

As a matter of fact there has never been an order to the German submarine commanders to kill shipwrecked sailors and not a single instance put before the International Military Tribunal was acknowledged as constitution a proof to that effect. At Nuremberg German submarine warfare was acquitted as a whole during the 2nd world war. The sentence passed on the 2 Grossadmirale Raeder and Doenitz was imposed on the strength of charges not connected at all with navel warfare.

During the Nuremberg trial Grossadmiral Doenitz himself, as a witness, had made the following statements referring to the case of Eck:

"Flottenrichter Kranzbuehler: "Do you approve of his attitude now that you know it ?"

Doenitz: "I do not approve of his attitude because, as I said a short time ago, it is not permissible to disregard the moral postulates existing for a soldier in battle.

In connection with this case I should like to say that Eck had to give a really serious decision. He was responsible for his boat and his crew and this responsibility is a very heavy one in war time. If he decided the way he did for the reason that he wanted to prevent his being detected and destroyed - this assumption was rather well founded as at that time in that area, if I remember right, 4 U-boats had been attacked with depth-charges - if, I repeat, he took his decision on account of such a reasoning a German

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court martial would certainly have given due consideration to that argument.

I think that one is inclined to look at matters in a different way after the war is over, as one is no longer imbued with the intensive feeling of great responsibility which used to weigh so heavily on the shoulders of U-boat commanders."

(Minutes of May 9, 1946, Forenoon)".

I am of the opinion that the view given in the preceding paragraph ought to be accepted owing to the now established fact that the attitude of Kapitaenleutnant Eck cannot be construed as an instance of a submarine warfare conducted in a generally criminal way, but must be looked upon as an individual case, in which an officer with little experience misjudged the military situation and the consequences resulting from it for his own boat when he came into contact with enemy forces for the first time.

In approaching the matter from this angle the attitude of the other members of the crew of the U-boat involved who carried out the orders of their commanding officer gets an entirely different aspect so that it appears fully justified to plead for a re-examination of the attitude of the men concerned, 2 years after the sentence and 2 and a half years after the cessation of the hostilities, on legal, military and human grounds.

In putting forward some view points in this connection my arguments ware based in the main on the following factual premises:

1) Kapitaenleutnant Eck did not give an order to fire on shipwrecked men; he only gave an order to destroy the rafts and wreckage.

2) He gave this order in his capacity as commanding officer directly to the sailor Schwender.

3) Schwender did not knowingly fire on shipwrecked people when executing this order and no evidence has been produced that his fire did kill any men at all.

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Taking this as a basis, Schwender can only be judged in a fair manner if his attitude is considered as that of a soldier engaged in battle.

The sentence of the International Military Tribunal expressly acknowledged that the attack of a submarine on an enemy merchantman constitutes an act of battle so that for this very reason the provisions of the London Naval Agreement on submarine warfare concluded in 1935 do not apply.

The attitude of warship commanders with respect to shipwrecked people after battle is governed by the Hague Convention, referring to the application of the principles of the Geneva Convention on Naval Warfare of October 18, 1909, section 16. According to this convention the commanders are duty-bound to take care as best as possible after the end of an action of all shipwrecked personnel of the enemy forces "as far as military considerations permit". It depends therefore entirely on how the military situation is judged, whether and to what extent any measures with respect to shipwrecked personnel are taken or not. It is understood that there is but one man aboard a warship who may properly judge this situation: the captain.

If owing to a wrong judgement of such a situation - I admit that this has been the case with Kapitaenleutnant Eck - a wrong order is given, it is obvious that in some cases, on account of the special conditions prevailing in naval warfare, such an order is likely not only to endanger the life of shipwrecked people but to jeopardize it altogether. In spite of that, however, nobody has so far drawn the conclusion of holding the helmsman responsible for leaving the scene of a battle on receipt of an order of his commanding officer to that effect without making an attempt at saving shipwrecked men.

If the plea of superior order is admissible at all in military matters as an excuse, then this applies to the relations between the commanding officer of a submarine and his crew in action. As a result of the fighting methods peculiar to a submarine there is only one man aboard ship who is able to see anything, and that is the captain of the

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vessel. This fact alone constitutes the necessity of absolute authority which the order of the commanding officer must have for his crew on account of the established customs and the necessities of submarine warfare. It is true that after the war the judgement of alleged or actual war crimes gave rise to doubts with respect to the authority of such orders. The German military penal code which applied for the relations between Kapitaenleutnant Eck and the sailor Schwender gave the latter the right to refuse carrying out the order of his commanding officer only if he knew that the order was aimed at committing a crime. Anyone who participated in war actions on the high seas with all their fighting excitement and the permanent danger incurred by the ships and their crews on account of possible enemy action both from the water and from the air will never come to think of the possibility that Schwender could have been able to see a criminal purpose in the order given him by his commander, or that he actually did see it. I repeat once more that the order was not intended to kill human beings.

I need not refer to the wellknown evolution which British military law has undergone during the last year of the war with respect to the question of superior orders.

Even the latest wording of the section 443 of the manual of British military law dated April 1944 obliges the court:

> "to properly weigh the fact, that obedience to military orders not obviously having an illegal character is the duty of every member of the armed forces and that the latter cannot be expected under the conditions governing war discipline to consider in every single case whether the order received is legally admissible or not."

The attitude of American law with respect to this problem is shown in the authoritative manual compiled by William Winthrop, Colonel, United States Army (2nd edition 1920) page 296 as follows:

"<u>OBEDIENCE TO ORDERS.</u>

That the act charged as an offence was done in obedience to the order - verbal or written - of a military superior, is, in general, a good defence at military law...

Where the order is apparently regular and lawful on its face, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, the only exceptions re-

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cognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness. Such would be a command to violate a specific law of the land or an established custom or written law of the military service, or an arbitrary command imposing an obligation not justified by law or usage, or a command to do a thing wholly irregular and improper given by a superior when incapacitated by intoxication or otherwise to perform his duty.

Except in such instances of palpable illegality, which must be of rare occurence, the inferior should presume that the order was lawful and authorized and obey it accordingly, and in obeying it he can scarcely fail to be held justified by a military court."

Even the most recent comment of American experts acknowledge, particularly with reference to conditions prevailing in submarine warfare, that orders the admissibility of which is doubtful according to International Law must be executed by the inferior with the sole responsibility resting with the superior issuing the order.

"Under these conditions it would seem clear that the officers and crew of a submarine cannot be punished as having committed "an act of piracy" if they have sunk a merchant ship without previous warning....
As for the act of ordering "unlimited submarine warfare the Juridical Committee would recall the repeated declarations condemning this act as a crime and exacting corresponding reparations.
(Report on the International juridical Status of Individuals as "War Criminals", Prepared by the Inter-American Juridical Committee. Editor: Pan American Union, Washington, D.C.August 1945". Page 5-6)."

There is another passage in the same report reading as follows:

"The Juridical Committee is of the opinion that the rule of some countries, denying the excuse of higher orders, should not applied too rigorously to crimes against the laws of war. The reason is that in many cases it would be impossible for subordinate officers to determine whether or not the act which they have been ordered to perform was justified as part of military operations."

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The above comparison of German penal law with the corresponding section of British and American penal law has been made only to show that the train of thoughts is essentially the same in the 3 legal systems in as much as the inferiors are not under obligation to examine the legal admissibility of orders imparted to them. Should, however, any discrepancies between the German and the Anglosaxon jurisdiction arise in this one point, Schwender can be judged only according with German law.

> "No state shall prosecute or punish an alien for an act or omission which was required of that alien by the law of the place where the alien was at the time of the act or omission. (Art.14).
> (DRAFT CONVENTION OF JURISDICTION WITH RESPECT TO CRIME!
> The American Journal of International Law
> The quarterly, Section Two - Official Documents, Volume 29 Number 3, July 1935, Published by the American Society of International Law)"

In the Comment supplementing this article, the draft convention states:

> "The individual should not suffer, through no fault of his own, because one State punishes what another State requires."

Another passage referring to this article reads as follows:

> "The principle formulated is so obviously just, however, that its acceptance as an integral part of the present Convention may be anticipated."

and

> "the principle of the present article is probably in harmony with relevant national and international practice."

The German Wehrmacht in its turn has recognized during the last war the conception prevalent in the jurisdiction of its opponents to the effect that the inferiors are bound to obey the military orders of their superiors. I wish to cite two instances to corroborate this:

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Although according to the German conception a merchantman does not have the right to attack a warship and although such merchantmen did actually attack German submarines in many instances, not a single charge was brought forward against the participating captains of the enemy vessels or against their gunners. Likewise, no court martial proceedings were held in Germany - contrary to what was done in Japan - against airplane crews who had participated in direct attacks on non-military targets, particularly in machine-gunning of civilians, i.e. actions contrary to International Law according to German interpretation. In both cases the Germans took the viewpoint that the respective war actions were carried out in accordance with and on account of orders imparted to the sailors and fliers concerned by their superiors.

I am convinced that it is possible now to a greater degree as in 1945 to give proper consideration to this train of thought, after the passions of war have cooled down.

The necessity of a review in the case under discussion appears all the more so justified as the defendants in the Eck trial were given only nine days for the preparation of the defence. Owing to this shortage of time the counsels of the defendants had no opportunity whatever to go to the core of the legal problems involved and to get the material documentation on indispensable for that purpose. The judgement imposed by the International Military Tribunal on the two Grossadmirale has shown to what extent the outcome of a trail may depend from whether de defence is afforded or not the possibility of properly preparing the evidence and the arguments of the case. This fact alone suffices to explain the obvious lack of proportion between the penalty of lo years imprisonment imposed on Grossadmiral Doenitz and his acquittal on the charge of naval warfare crimes as compared with the term imposed on Schwender, a plain sailor.

Schwender has been detained and deprived of his personal liberty since spring 1944, when he was made a prisoner of war and is now serving his term in prison since October 1945. Owing to his youth such a situation is likely to seriously endanger his development and to spoil his future. I dare say that such dire consequences are not intended by nor compatible with real justice.

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Schwender is the only son of the family, and his parents and sister wait for him as their help and support. This should be a humane argument for releasing him at an early date.

For the above reason I plead in the name of the defendant and his relatives that the court appoint a date for the review of the case of Schwender and to recommend him to the competent authorities for an early pardon and release from prison.

Mary Luther

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